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No. 89-7370

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MOSHE GOZLON-PERETZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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(9)

1989

QUESTIONS PRESENTED

1. Whether the district court erred in admitting statements made by petitioner's co-conspirator under Fed. R. Evid. 801(d)(2)(E) based on its determination that a preponderance of the evidence supported the existence of a conspiracy.

2. Whether the mandatory minimum terms of supervised release required by the Anti-Drug Abuse Act of 1986 became effective for offenses committed on or after the date of enactment, October 27, 1986.

3. Whether 18 U.S.C. 3013, which directs sentencing courts to impose monetary assessments on all defendants convicted of federal offenses, was enacted in violation of the Origination Clause of the Constitution.

(I)

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OPINIONS BELOW

The opinion of the court of appeals (en banc) resolving the hearsay question (Pet. App. B) is reported at 865 F.2d 551. The opinion of the court of appeals resolving the sentencing issues (Pet. App. A) is reported at 894 F.2d 1402.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1990. The petition was filed April 25, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the District of New Jersey, petitioner

was convicted of conspiracy to distribute more than one kilogram of heroin (Count 1), in violation of 21 U.S.C. 846; aiding and abetting the distribution of approximately 240 grams of heroin (Count 2), in violation of 21 U.S.C. 841(a)(1); and aiding and abetting the possession of more than one kilogram of heroin with intent to distribute it (Count 3), in violation of 21 U.S.C. 841(a)(1). He was sentenced to 20 years' imprisonment on Count 1; 15 years' imprisonment and a five-year term of special parole on Count 2; and 15 years' imprisonment, a five-year term of special parole, and a \$200,000 fine on Count 3. All the sentences were set to run concurrently, and the court also imposed a special assessment of \$150 under 18 U.S.C. 3013. See Pet. C.A. App. at 54a. The court of appeals affirmed the convictions but remanded for resentencing to change the denomination of petitioner's five-year terms of post-confinement monitoring from "special parole" to "supervised release."

1. The facts of petitioner's offenses are described in the court of appeals opinion in United States v. Levy, 865 F.2d 551, 552-556 (3d Cir. 1989) (en banc) (Pet. App. B). Petitioner Gozlon-Peretz conspired with his co-defendants Levy and Yehuda to sell heroin to Agent Paul Maloney, an undercover DEA agent, on February 25, 1987. Prior to the actual exchange, Yehuda, who acted as the intermediary for the sale, had numerous conversations with Agent Maloney in which he referred to "his friend" (Gozlon-Peretz) and the friend's "girlfriend" (Levy) as

the sellers and his co-conspirators in the heroin sale. On the day of the sale, Yehuda, Levy, and petitioner checked into room 1002 at the Sands Hotel in Atlantic City, and Yehuda also rented another room at the Sands and a room at the Golden Nugget Hotel. 865 F.2d at 554. During one of their meetings in the Sands Hotel lobby, Agent Maloney overheard Yehuda ask the telephone operator for room 1002. Yehuda then had a conversation in a foreign language over the telephone. Id. at 555. Once the sale was made, Yehuda was arrested and room 1002, as well as room 1430, which had also been rented by Yehuda, were searched.

During the room searches and the follow-up investigation, evidence was uncovered linking Gozlon-Peretz and Levy to the heroin-sale conspiracy with Yehuda. First, it was verified that telephone calls had been placed from room 1002 to the pay phone used by Yehuda at the times Agent Maloney saw Yehuda receiving the calls. Also, a beeper was found in room 1002 with a number coinciding with the number Yehuda had called during one of his meetings with Agent Maloney. Id. at 555-556. In addition, foreign passports were discovered in room 1002 in the names of Pasquale DiStefano and Annette Amar, the names used by Gozlon-Peretz and Levy to identify themselves when they were questioned after their arrests; two Greyhound tickets were discovered in room 1002 with numbers consecutive to the number of a like ticket found on Yehuda; a bill was found in room 1002 from the Novotel in New York City, the hotel called by Yehuda to reach his friend

during an earlier meeting with Agent Maloney respecting the heroin sale; and 2,127 grams of 24 percent heroin hydrochloride were discovered in room 1430. Ibid.

2. At trial, the district court admitted Agent Maloney's hearsay testimony about Yehuda's statements incriminating petitioner as co-conspirator declarations under Fed. R. Evid. 801(d)(2)(E). In deciding whether there was sufficient evidence of a conspiracy to admit the statements, the district court applied the then-governing Third Circuit precedent, United States v. Ammar, 714 F.2d 238 (3d Cir.), cert. denied, 468 U.S. 936 (1983), which required the court to determine, based on the record evidence without reference to the purported co-conspirator statements, that it was more likely than not that those statements were made in furtherance of a then-existing conspiracy.

2. On January 9, 1989, the court of appeals affirmed petitioner's conviction but remanded for resentencing. The court expressed concern that the district court may have imposed 20-year sentences on Counts 2 and 3 based on the belief that petitioner would be eligible for parole after serving 10 years, whereas the applicable statute, 21 U.S.C. 841(b)(1)(A), provided for no parole eligibility. The court of appeals therefore vacated petitioner's sentence and remanded for resentencing.

On remand, the district court reduced the terms of imprisonment on Counts 2 and 3 from 20 to 15 years, once again to

be followed by a five-year term of special parole.

3. On appeal from that judgment, petitioner challenged the five-year term of special parole and the special assessments imposed under 18 U.S.C. 3013. Petitioner argued that the post-confinement monitoring provisions of the Anti-Drug Abuse Act of 1986 (ADAA), Pub. L. No. 99-570, tit. I, § 1002, 100 Stat. 3207-2, did not become effective until November 1, 1987, after the commission of his crime, and that he was therefore not subject to post-confinement monitoring of any sort. Petitioner further argued that the special assessment statute, 18 U.S.C. 3013 was enacted in violation of the Origination Clause of the Constitution. The court of appeals rejected both contentions, but directed the district court to designate petitioner's post-confinement monitoring as supervised release instead of special parole.

ARGUMENT

1. Petitioner claims (Pet. 24-29) that the court of appeals applied an incorrect standard to determine whether petitioner and Yehuda were members of a conspiracy so that Yehuda's incriminating statements to Agent Maloney could be admitted against petitioner under Fed. R. Evid. 801(d)(2)(E). The court of appeals correctly held that, even without reference to Yehuda's incriminating statements to the undercover agent, the evidence linking petitioner to Yehuda's heroin sale conspiracy was sufficient to support the admission of Yehuda's statements as

co-conspirator declarations. Even though, as petitioner points out, Agent Maloney was unable to understand what Yehuda was saying in a foreign language to the person in room 1002, and of course was unable to hear what Yehuda heard, it was entirely reasonable and appropriate for the district court and the court of appeals to infer from Yehuda's actions after the telephone conversations that he had been discussing the heroin sale with "his friend." And it was reasonable to infer that that friend was petitioner, since there was evidence that Yehuda was speaking to someone in room 1002, and petitioner occupied that room. In addition, there was abundant additional circumstantial evidence linking petitioner to Yehuda and to Yehuda's illegal drug activities. Thus, as the court of appeals concluded, there was unquestionably a sufficient basis to conclude that petitioner and Yehuda were co-conspirators in the heroin sale even without taking into account the co-conspirator's statements themselves.^{1/}

Petitioner suggests (Pet. 25-29) that this Court should

¹ The court of appeals found it unnecessary to decide whether this Court's decision in Bourjaily v. United States, 483 U.S. 171 (1987), should be applied retroactively to this case. In Bourjaily, the Court held that the contents of a co-conspirator's statements may be considered in determining whether the evidence is sufficient to admit the statements. The court of appeals found that the co-conspirator's statements were admissible even under the more restrictive standard the court had applied before Bourjaily. In any event, there is no reason why Bourjaily should not be applied retroactively, since the Court in that case was simply construing a rule of evidence in existence at the time of petitioner's trial.

grant certiorari to resolve a disagreement among the circuits on the question whether the admission of the co-conspirator's statements must be supported by evidence tending to demonstrate the existence of the charged conspiracy, a criminal conspiracy, or merely a joint undertaking. However, this case does not present that issue for resolution. It is clear that the court of appeals understood the district court to have found the evidence sufficient to demonstrate by a preponderance that the charged criminal conspiracy existed. See 865 F.2d at 553, 556-558. The court thus affirmed the admissibility of the evidence under the most stringent standard.

2. We believe that the court of appeals was correct to rule that the penalty provisions of the ADAA went into effect on the October 26, 1987, date of enactment, and to affirm petitioner's term of supervised release imposed under applicable provisions of the ADAA. We also agree with petitioner, however, that the Court should grant the petition in this case to resolve the conflict among the circuits respecting the effective date of the provisions mandating minimum terms of post-confinement monitoring in the form of supervised release under the ADAA.

a. By the plain terms of Section 1002 of the ADAA, which revised the penalty provisions governing petitioner's offense, it was proper for the district court to include in petitioner's sentence a term of five years' supervised release. Section 1002 did not expressly provide for an effective date, and the courts

of appeals are in conflict respecting the effective date of the ADAA's post-confinement monitoring provisions. The confusion has been caused by differing interpretations of a separate ADAA provision, Section 1004, which provides that, on November 1, 1987, the term "supervised release" shall be substituted for the term "special parole" wherever the latter term appears in the provisions in effect at that time.^{2/} The effective date of that change was also the effective date of 18 U.S.C. 3583, the provision of the Sentencing Reform Act of 1984 that implemented the new concept of supervised release. See Pub. L. No. 99-570, § 1004(b), 100 Stat. 3207-6 (1986). However, Section 1004 does not refer to, or delay the effective date of, any other provision.

b. Three circuits have ruled that the ADAA's post-confinement monitoring provisions became effective immediately upon the enactment of the ADAA, October 27, 1986. Three other circuits have ruled that the post-confinement monitoring provisions became effective on November 1, 1987, and therefore are applicable only to offenses committed after that date. Several other courts of appeals have addressed this question with more ambiguous results.

² Because the ADAA did not effect revisions in all of the existing drug-penalty provisions, after the enactment of the ADAA there remained provisions calling for "special parole" even though the ADAA employed only the terminology "supervised release" in its penalty provisions. Compare 21 U.S.C. 841(b)(1)(A)-(C), 845a(b), 845b(b) and 845b(c), 960(b)(1)-(3) (Supp. IV 1986) (supervised release) with 21 U.S.C. 841(b)(1)(D), 841(b)(2), 845(a), 845(b), 845a(a) and 960(b)(4) (Supp. IV 1986) (special parole), and 21 U.S.C. 962(a) (1982) (same).

The Third, Ninth, and District of Columbia Circuits have held that the ADAA's provisions requiring supervised release became effective immediately upon enactment, October 27, 1986, and apply to offenses committed on or after that date. United States v. Gozlon-Peretz, 894 F.2d 1402 (3d Cir. 1990), cert. pending, No. 89-7370; United States v. Torres, 880 F.2d 113 (9th Cir. 1989), cert. denied, 110 S. Ct. 873 (1990); United States v. Brundage, No. 89-3068 (D.C. Cir. May 18, 1990). In Gozlon-Peretz and Torres, the courts of appeals upheld a sentence of a five-year term of supervised release imposed under 21 U.S.C. 841(b)(1)(A) (Supp. IV 1986), whereas in Brundage, the court upheld a four-year term of supervised release under 21 U.S.C. 841(b)(1)(B) (Supp. IV 1986). All three cases involved offenses for which the pre-ADAA sentencing provisions did not provide for any term of post-confinement monitoring. See 21 U.S.C. 841(b)(1)(A) (Supp. II 1984). These courts applied the plain meaning of the statute, with respect to both the duration and the terminology of post-confinement monitoring. In our view, the Third, Ninth, and D.C. Circuits have correctly construed the statute.^{3/}

³ Unlike Section 1004, which provided for the elimination of all references to special parole terms in the Controlled Substances Act as of November 1, 1987, Section 1002 of the ADAA did not include any specific reference to its effective date. In the absence of any provision postponing the effective date of that Section, it took effect immediately. Arnold v. United States, 9 Cranch 103, 119 (1815); United States v. Shafer, 789 F.2d 682, 686 (9th Cir. 1986). The reference in Section 1004 to a delayed effective date for the changes made "by this section"

On the other hand, the Fourth, Seventh, and Tenth Circuits have ruled that the ADAA's post-confinement monitoring provisions apply only to offenses committed after November 1, 1987. United States v. Levario, 877 F.2d 1483 (10th Cir. 1989); United States v. Whitehead, 849 F.2d 849 (4th Cir.), cert. denied, 109 S. Ct. 534 (1988); United States v. Duprey, 895 F.2d 303 (7th Cir. 1989), cert. denied, No. 89-6512 (Apr. 23, 1990). In Whitehead, the Fourth Circuit vacated four-year terms of supervised release imposed under 21 U.S.C. 841(b)(1)(B) and 960(b)(2) (Supp. IV 1986). The court accepted the same arguments pressed by petitioner here, and concluded that the ADAA's post-confinement monitoring provisions became effective on November 1, 1987, after the date of the defendants' offenses. The court remanded for resentencing under the pre-existing penalty provisions, which provided for shorter mandatory minimum terms of

plainly did not delay the effective date of a different section, Section 1002. See Gov't Br. in Opp. at 6 in United States v. Torres, 880 F.2d 113 (9th Cir. 1989), cert. denied, 110 S. Ct. 873 (Jan. 22, 1990); Gov't Br. in Opp. at 4 in United States v. Villasenor, 884 F.2d 1496 (9th Cir. 1989), cert. denied, No. 89-6434 (Apr. 16, 1990).

Moreover, as discussed in our Brief in Opposition at 8-9 in Torres, *supra*, the legislative history of the 1986 Act reveals that Congress intended for some kind of post-confinement monitoring to go into effect immediately under the revised Section 841(b), and to be applicable to all persons subject to sentencing under that statute. The plain terms of the substantive provisions in the ADAA governing post-confinement monitoring refer to supervised release, and there is no reason to read these provisions as imposing the type of post-confinement monitoring--special parole--that was available under pre-existing law.

post-confinement monitoring--three rather than four years--in the form of special parole.^{4/} See also United States v. Duprey, 895 F.2d at 310-311 (remand for sentencing under pre-ADAA provision providing for shorter mandatory minimum term of post-confinement monitoring in the form of special parole). In Levario, the court of appeals for the Tenth Circuit vacated a five-year term of supervised release imposed under the ADAA, 21 U.S.C. 841(b)(1)(A) (Supp. IV 1986), also based on the conclusion that the post-confinement monitoring provisions of the ADAA did not become effective until November 1, 1987. That ruling had the effect of omitting any period of post-confinement monitoring, because the pre-existing statute did not provide for any term of post-confinement monitoring for the defendant's offense. See 21 U.S.C. 841(b)(1)(A) (Supp. II 1984).^{5/}

⁴ In Whitehead, the court remanded for resentencing under the penalty provisions of 21 U.S.C. 841(b) and 960(b) (1982)--that is, the provisions in effect in 1982, before the 1984 enactment of the predecessor provisions to the ADAA. The reasoning in Whitehead, however, supported a remand for resentencing under the 1984 penalty provisions, 21 U.S.C. 841(b)(1)(B) and 960(b)(2) (Supp. II 1984).

⁵ At least two circuits (the Fifth and Eleventh) have followed an approach that appears, at first impression, to accord with the Fourth and Tenth Circuit views, but on closer inspection is unclear. These circuits (the Fifth and Eleventh) adopted the position of the Fifth Circuit in United States v. Byrd, 837 F.2d 179, 181 n.8 (5th Cir. 1988), which was the first court of appeals to consider the issue of the effective date of the penalty provisions under the ADAA. The Byrd court concluded that Congress did not intend the ADAA's provisions for supervised release to become effective until November 1, 1987. However, the offense at issue in Byrd was one for which both the post- and pre-ADAA penalty provisions required a minimum sentence of post-confinement monitoring of the same duration--three-years.

The First Circuit follows yet another approach. In opinions in two different cases, the First Circuit has affirmed a sentence of supervised release under 21 U.S.C. 841(b)(1)(A) (Supp. IV 1986) and a sentence of special parole under 21 U.S.C. 841(b)(1)(C) (Supp. IV 1986), for offenses committed during the pertinent period, even though the applicable penalty provisions

Compare 21 U.S.C. 841(b)(1)(C) and 845a(a) (Supp. IV 1986) with 21 U.S.C. 841(b)(1)(B) and 845a(a) (Supp. II 1984). The only issue directly decided was whether post-confinement monitoring should be in the form of "special parole" or "supervised release," not whether the delayed effective date of the ADAA provisions applied to the length of post-confinement monitoring as well.

Many courts of appeals, including the Fourth and Tenth Circuits in cases cited above, have invoked Byrd for the broad proposition that the post-confinement monitoring provisions of the ADAA did not become effective until November 1, 1987, without explicitly distinguishing between terminology and duration of sentence. However, the Eleventh Circuit applied that principle in a subsequent case where, as in Byrd, the duration of the applicable post-confinement sentence was the same under the ADAA and its predecessor, thus obviating the need to address whether the delayed effective date applied to duration as well as terminology. See United States v. Smith, 840 F.2d 886 (11th Cir.), cert. denied, 109 S. Ct. 154 (1988) (sentencing provision provided for three year term under old and new law).

The First Circuit has explicitly separated the issue of duration and type of monitoring in United States v. Ferryman, No. 89-1486 (Feb. 21, 1990). In that case the court decided that, with regard to an offense for which the penalty provision of the predecessor to the ADAA prescribed a minimum term of special parole of the same duration as the term of supervised release required under the ADAA, the correct form of post-confinement monitoring was special parole. In denying the government's petition for rehearing for clarification of the ruling, the court stated that "the issue of the length of mandatory minimum terms of post-confinement monitoring for drug related offenses committed during the hiatus period" (emphasis added) had neither been raised below nor presented to the court of appeals, and that the panel opinion should therefore not "be read as intimating any view on that issue."

of the ADAA provided for a term of supervised release for both offenses. In United States v. Ferryman, No. 89-1486, slip op. at 12-13 (1st Cir. Feb. 21, 1990), the court reasoned that an offense that would have been punishable by special parole had it been committed prior to enactment of the ADAA should continue to be punishable by post-confinement monitoring in the form of special parole if it was committed before November 1, 1987.⁶ In United States v. Figueroa, No. 89-1745, slip op. at 6-8 (1st Cir. Mar. 21, 1990), the court concluded that an offense that would not have been punishable by any type of post-confinement monitoring had it been committed prior to the enactment of the ADAA should be punishable by supervised release if it were committed after October 27, 1986, because Congress clearly intended that some form of post-confinement monitoring apply, and only the ADAA provided for such monitoring.⁷

c. This Court should resolve the conflict that has developed among the circuits respecting the effective date of the ADAA's post-confinement monitoring provisions. Although this issue only affects sentences for drug offenses committed between

⁶ The court did not address the question of whether the pre-ADAA penalty provisions governed the duration of special parole for this category of offenses. See note 5, supra.

⁷ The categories of drug offenses under the pre- and post-ADAA law do not overlap precisely. The reasoning of the First Circuit results in offenders sentenced under the same ADAA penalty provision receiving different types of post-confinement monitoring, depending on which pre-ADAA category covered their offense.

October 27, 1986, and November 1, 1987, many thousands of cases fall into this category.^{8/} The conflict among the circuits has produced a large number of Rule 35 and Section 2255 motions by offenders seeking modification of the portion of their sentences dealing with post-confinement monitoring. Because of the number of cases affected and the now-established conflict among the

⁸ Jurisdiction over a defendant sentenced to supervised release remains with the district court, which imposes the conditions of post-confinement monitoring and presides over revocation proceedings. Special parole, on the other hand, is administered by the Parole Commission. Compare 18 U.S.C. 3583 and 18 U.S.C. 4201-4218. Therefore, as long as the circuit split persists, there is a potential for litigation by prisoners transferred from a supervised release jurisdiction to one where special parole applies. As the Third Circuit in Gozlon-Peretz, 894 F.2d at 1406 n.6, explained, "the defendant can claim that the Parole Commission has jurisdiction and that the Commission's reparole guidelines should apply." In addition, "a defendant in such a situation could also claim that he is entitled to early termination of parole pursuant to 18 U.S.C. 4211(c), a provision that has no parallel for supervised release." 894 F.2d at 1406 n.6.

There is another difference between supervised release and special parole that could give rise to additional litigation. Although a violation of both special parole and supervised release may subject the offender to revocation and reincarceration for the entire original term of post-confinement monitoring without any credit for time spent complying with its conditions, see 18 U.S.C. 3583(e)(3) (Supp. IV 1986) (supervised release) and 21 U.S.C. 841(c) (Supp. IV 1986) (special parole), the district court has authority, not possessed by the Parole Commission, to extend the term of supervised release as one of the remedies for a violation, see 18 U.S.C. 3583(e)(2) (Supp. IV. 1986). An offender sentenced to special parole who violates the terms of his release and faces re-incarceration could conceivably complain that he should be entitled, like those subject to supervised release, to consideration of the option of extension of his term of monitoring as a penalty for violation.

circuits, a definitive ruling by this Court is needed.^{2/}

This case is a suitable vehicle for resolving the conflict among the circuits on the post-confinement monitoring issue. Unlike in some cases raising the issue, the outcome of the case will clearly and substantially affect petitioner. If his theory of the case is correct, he will be subject to no post-confinement monitoring at all, while he is now subject to a five-year term of supervised release. Furthermore, the issue is well defined in this case by a court of appeals opinion that discusses the competing views and statutory arguments in detail. We therefore urge that the Court grant the petition with respect to Question 2, the post-confinement monitoring issue.

3. Finally, petitioner maintains (Pet. 29) that the special assessment statute, 18 U.S.C. 3031, is unconstitutional and that

⁹ This issue has been raised twice previously this Term in petitions for certiorari. In Torres v. United States, cert. denied, 110 S. Ct. 873 (Jan. 22, 1990), we opposed this Court's review in the hope that other courts of appeals might reassess their positions in light of this ruling, which we believed to be correct, and because there was no compelling need immediately to address the terms of post-confinement release in light of the substantial mandatory minimum terms of imprisonment required under the drug laws. Our subsequent decision to oppose review in another Ninth Circuit case that followed the holding in Torres, see Gov't Br. in Opp. in United States v. Villasenor, cert. denied, No. 89-6434 (Apr. 16, 1990), was buttressed by the Third Circuit's January 1990 decision in Gozlon-Peretz, *supra*, which supported our hope for a satisfactory resolution without this Court's intervention. However, the First Circuit's opinions in Ferryman and Figueroa, which appeared, respectively, shortly before and after our filing in Villasenor, have satisfied us that the courts are moving in the direction of even greater confusion on this issue, and that it is unrealistic to expect that the conflict among the circuits will resolve itself without this Court's intervention.

he therefore should not have to pay the special assessments imposed in this case. That issue has recently been resolved against petitioner by this Court in United States v. Munoz-Flores, No. 88-1932 (decided May 21, 1990).

CONCLUSION

The petition for a writ of certiorari should be granted, limited to the ADAA post-confinement monitoring question (Question 2).

Respectfully submitted.

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the BRIEF FOR THE UNITED STATES by mail on May 23, 1990.

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May 23, 1990

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